UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

CITY OF LEWISTON,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	
	)	
FLEET ENVIRONMENTAL SERVICES, LLC, et al.,	***)***	
	)	
Defendants	***)***	
	)	
and	***)***	***Docket No. 03-141-P-H***
	)	
FLEET ENVIRONMENTAL SERVICES, LLC,	***)***	
	)	
Third-Party Plaintiff	***)***	
	)	
v.	***)***	
	)	
PLATZ ASSOCIATES, et al.,	***)***	
	)	
Third-Party Defendants	***)***	

RECOMMENDED DECISION ON CROSS-MOTIONS FOR PARTIAL SUMMARY JUDGMENT

Fleet Environmental Services, LLC ("Fleet"), one of four named defendants, moves for summary judgment on Counts IX-X and XIII-XVII of the amended complaint. Fleet Environmental Services LLC's Motion for Partial Summary Judgment, etc. ("Fleet Motion") (Docket No. 81) at 1. The plaintiff moves for summary judgment on Counts IX, X and XVII of the amended complaint. Joint Motion for Partial

Summary Judgment by Lewiston, LMRC, and Platz Associates, etc. ("Lewiston Motion") (Docket No. 84) at 1. The third-party defendants, Platz Associates ("Platz") and Lewiston Mill Redevelopment Corporation ("LMRC"), move for summary judgment on Counts II, III, V and VI of the third-party complaint and on Counts I and IV of their counterclaims against Fleet. *Id*. at 1-2. I recommend that the court grant the motions in part.

I. Summary Judgment Standard

Summary judgment is appropriate only if the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "In this regard, 'material' means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute over it is resolved favorably to the nonmovant. By like token, 'genuine' means that 'the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party.'" *Navarro v. Pfizer Corp*., 261 F.3d 90, 93-94 (1st Cir. 2001) (quoting *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995)). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Nicolo v. Philip Morris, Inc.*, 201 F.3d 29, 33 (1st Cir. 2000). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, the nonmovant must "produce specific facts, in suitable evidentiary form, to establish the presence of a trialworthy issue." *Triangle Trading Co. v. Robroy Indus., Inc.*, 200 F.3d 1, 2 (1st Cir. 1999) (citation and internal punctuation omitted); Fed. R. Civ. P. 56(e). "As to any essential factual element of its claim on which the nonmovant would bear the burden of proof at trial, its failure to come forward with sufficient evidence to

generate a trialworthy issue warrants summary judgment to the moving party." *In re Spigel*, 260 F.3d 27, 31 (1st Cir. 2001) (citation and internal punctuation omitted).

The mere fact that multiple parties seek summary judgment does not render summary judgment inappropriate. 10A Charles Wright, Arthur Miller & Mary Kane, *Federal Practice and Procedure* ("Wright, Miller & Kane") § 2720 at 327-28 (3d ed. 1998). For those issues subject to cross-motions for summary judgment, "the court must consider each motion separately, drawing inferences against each movant in turn." *Merchants Ins. Co. of New Hampshire, Inc. v. United States Fidelity & Guar. Co.*, 143 F.3d 5, 7 (1st Cir. 1998) (citation omitted). If there are any genuine issues of material fact, the opposing motions must be denied as to the affected issue or issues of law; if not, one moving party is entitled to judgment as a matter of law. 10A Wright, Miller & Kane § 2720.

II. Factual Background

The statements of material facts submitted by the parties pursuant to Local Rule 56 include the following undisputed material facts.

On or about October 26, 1999 the plaintiff, through its agents Platz and LMRC, entered into a contract with Fleet for the abatement of lead paint from Mill 3 of the Bates Mill Complex (the "Mill 3 Contract"). Fleet Environmental Services LLC's Supporting Statement of Material Facts ("Fleet SMF") (Docket No. 82) ¶ 1; Lewiston's Statement of Material Facts in Opposition to Fleet's Statement of Facts ("Plaintiff's Responsive SMF") (Docket No. 102) ¶ 1. The Bates Mill Complex is a group of buildings in Lewiston, Maine, owned by the plaintiff, that formerly comprised the Bates Fabrics manufacturing facility. Joint Statement of Undisputed Material Facts in Support of Lewiston, LMRC, and Platz Associates' Motions for Partial Summary Judgment ("Lewiston SMF") (Docket No. 85) ¶ 2; Fleet Environmental Services LLC's Opposing Statement of Facts, etc. ("Fleet's Responsive SMF") (Docket No. 105) ¶ 2. In

1993, the plaintiff leased the Bates Mill Complex to LMRC, a non-profit corporation wholly owned by the plaintiff and charged with managing the day-to-day operations and redevelopment of the complex. *Id*. ¶ 3. LMRC hired Platz to serve as its architect and construction manager for the redevelopment of the complex. *Id*. According to the terms of the Mill 3 Contract, Fleet, through Maine SF, Inc., agreed to remove lead paint from the interior of Mill 3. Fleet SMF ¶2; Plaintiff's Responsive SMF ¶ 2.

Prior to entering into the Mill 3 Contract, Fleet had authorized James Jabbusch of Maine SF, Inc. to sign and submit a proposal for the lead abatement work to Platz in Fleet's name and on Fleet's behalf. Lewiston SMF ¶ 5; Fleet's Responsive SMF ¶ 5. Except for the attachments outlining the project's scope of work, the Mill 3 Contract was Fleet's own "boilerplate" services agreement form. *Id*. ¶ 6. In the Mill 3 Contract, Fleet represented that it was "engaged in the business of providing environmental services in accordance with the work requirements of *Client* as defined from time to time by *Scope of Work*." *Id*. ¶ 7. Exhibit A to the Mill 3 Contract is concerned with the removal of lead paint to be "performed in accordance with Federal, State and Local regulations and guidelines." *Id*. ¶ 8. Fleet represented to LMRC that it and its employees had specialized experience, knowledge and expertise in the abatement and disposal of lead paint. Lewiston's Response Statement of Material Facts ("Plaintiff's Additional SMF") (beginning at page 12 of Plaintiff's Responsive SMF) ¶ 35.[1] Fleet also contracted to make the arrangements for the "waste disposal and transport by others." Lewiston SMF ¶ 9; Fleet's Responsive SMF ¶ 9. The Mill 3 Contract provided that the scope of work might be modified, and the work increased, at LMRC's expense. *Id*. ¶ 11. The Mill 3 Contract includes a clause whereby Fleet indemnifies LMRC. *Id*. ¶ 12. The plaintiff, not LMRC, paid Fleet under the Mill 3 Contract. *Id*. ¶ 13. The Mill 3 Contract also includes the plaintiff's

[1] Fleet filed no response to the plaintiff's statement of additional material facts. Accordingly, they are deemed admitted to (*continued on next page*)

warranty that the work Fleet was to do "does not violate any judicial or administrative order or ruling of any governmental agency of which [the plaintiff] has knowledge." Fleet's SMF ¶ 5; Plaintiff's Responsive SMF ¶ 5.

Fleet subcontracted the Mill 3 lead paint abatement to Maine SF, Inc. Lewiston SMF ¶ 15; Fleet's Responsive SMF ¶ 15. Fleet specified to Maine SF, Inc. that it wanted to handle the transportation and disposal of the Mill 3 wastes, whether they turned out to be hazardous or non-hazardous. *Id*. ¶ 20. Fleet knew that Maine SF, Inc. was having cash-flow problems and creditor issues and did not have adequate capital to do the Mill 3 lead paint abatement alone. *Id*. ¶ 21. Maine SF, Inc. would have closed if it had not obtained the Mill 3 lead abatement work. *Id*. ¶ 23. James Jabbusch did not inform Platz of Maine SF, Inc.'s financial difficulties. *Id*. ¶ 24.

Maine SF, Inc. blasted the lead paint from the walls of Mill 3 in accordance with the terms of the Mill 3 contract. Fleet's SMF ¶ 11; Plaintiff's Responsive SMF ¶ 11. Brian House, Fleet's Executive Vice President charged with the oversight of Fleet's day-to-day operations, visited Mill 3, met with the Platz construction manager, Bruce Allen, and was generally responsible for the Mill 3 lead paint abatement. Lewiston SMF ¶ 26; Fleet's Responsive SMF ¶ 26. Maine SF, Inc. hired Disney Environmental Services, Inc. ("Disney") to collect samples for a Toxicity Characteristic Leaching Procedure ("TCLP") test of the Mill 3 blasting grit. Fleet's SMF ¶ 12; Plaintiff's Responsive SMF ¶ 12. James Jabbusch's son Peter gathered the sample of Mill 3 grit used for TCLP testing. *Id*. ¶¶ 14-15; Lewiston SMF ¶ 29; Fleet's Responsive SMF ¶ 29. Jabbusch had never previously collected lead waste sample. Fleet's SMF ¶ 16; Plaintiff's Responsive SMF ¶ 16. Neither the Mill 3 Contract, Fleet's contract with Platz as construction

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the extent supported by the record references given. Local Rule 56(e).

manager for LMRC nor Fleet's subcontract with Maine SF, Inc. identified anyone as being responsible for sampling and testing the Mill 3 wastes. Lewiston SMF ¶¶ 34-35; Fleet's Responsive SMF ¶¶ 34-35.

In 1997 Maine SF, Inc. had conducted lead paint abatement in Mill 7 of the Bates Mill Complex, and Eric Jabbusch, another of James Jabbusch's sons, had sent a sample of waste sandblast media to Disney for TCLP testing. *Id*. ¶¶ 30, 37. When Disney received the Mill 7 test result, it informed James Jabbusch that Maine SF, Inc. should treat all surfaces as having lead unless more testing was performed because Disney had conducted XRF lead testing there. *Id*. ¶ 38.

Two samples of waste sandblast media from Mill 3 were tested. *Id*. ¶ 39. Disney was paid by Maine SF, Inc. for the tests. *Id*. ¶ 40. Fleet paid Maine SF, Inc. a flat figure of $100,000, which included Disney's charges. *Id*. ¶ 41. James Jabbusch kept Fleet informed of the test results for the waste sandblast media. *Id*. ¶ 42. Peter Jabbusch had assembled the first sample of waste sandblast media for testing by collecting material from several locations in the work area, including a wall, ceiling and beam. *Id*. ¶ 43. According to the November 19, 1999 TCLP test of the Mill 3 grit, the sample had a lead concentration of 36.1 parts per million ("ppm"). Fleet's SMF ¶ 18; Plaintiff's Responsive SMF ¶ 18. Eric Jabbusch gathered a second sample. *Id*. ¶ 22. While awaiting the results of the TCLP test for the second sample of Mill 3 grit, Maine SF, Inc. advised Allen, the authorized agent of the plaintiff and LMRC, of the results of the first TCLP test. *Id*. ¶ 23. Allen did not inform the plaintiff or LMRC of the results of the first TCLP test. *Id*. ¶ 24. Fleet was told about the result of the first test but took no action. Lewiston SMF ¶ 46; Fleet's Responsive SMF ¶ 46. On or about November 30, 1999 Disney provided Mane SMF, Inc. with the results of the TCLP test of the second sample of Mill 3 grit. Fleet's SMF ¶ 25; Plaintiff's Responsive SMF ¶ 25. The result of the second test showed a lead concentration of 0.6 ppm. *Id*. ¶ 26.

On December 3, 1999 the company that Fleet hired to transport the Mill 3 grit, Ameritech Environmental Services, Inc., transported the first batch of the Mill 3 grit to the plaintiff's solid waste and recycling facility (the "Landfill"). *Id*. ¶¶ 7, 27. The disposal ticket for the Mill 3 grit indicated that the material being disposed of was sand blast grit from Mill 3. *Id*. ¶ 28. Seventy-five tons of Mill 3 waste sandblast media were transported to and disposed of at the Landfill. Lewiston SMF ¶ 52; Fleet's Responsive SMF ¶ 52. The Landfill is not a hazardous waste disposal facility. *Id*. ¶ 53.

After the Mill 3 waste sandblast media were disposed of at the Landfill, the U.S. Environmental Protection Agency ("EPA") investigated the sampling, lead characterization and disposal of the wastes. *Id.* ¶ 54. The EPA advised the plaintiff that it believed the Mill 3 grit in the Landfill was hazardous. Fleet's SMF ¶ 29; Plaintiff's Responsive SMF ¶ 29. The plaintiff's superintendent of solid waste told the Maine Department of Environmental Protection's ("DEP") project manager about the EPA investigation. Lewiston SMF ¶ 56; Fleet's Responsive SMF ¶ 56. After preliminary testing, the DEP ordered the plaintiff to remediate the Landfill by removing the wastes and adjacent overburden and fill and by disposing of these materials at a licensed hazardous waste disposal facility. *Id*. ¶ 57. The plaintiff and its consultant, CMA Engineers, Inc., argued unsuccessfully that leaving the grit in the landfill would not threaten the public. Fleet's SMF ¶¶ 32-33; Plaintiff's Responsive SMF ¶¶ 32-33. The DEP issued a Notice of Violation to the Landfill and commenced a Consent Action against the plaintiff seeking to impose fines on the plaintiff relating to the Mill 3 grit. *Id*. ¶ 34. Consistent with the DEP-approved work plan for the remediation of the Landfill, 211 tons of hazardous Mill 3 grit and associated overburden and substrata were removed from the Landfill and transported to New York for disposal. Plaintiff's Additional SMF ¶ 52.

III. Discussion

A. Counts IX, X and XVII of the Amended Complaint

Counts IX, X and XVII of the amended complaint are subject to cross-motions for summary judgment by the plaintiff and Fleet. Count IX seeks CERCLA response costs. Amended Complaint, etc. (Docket No. 33) ¶¶ 84-88. Count X seeks relief under 30-A M.R.S.A. § 3352(2) and 38 M.R.S.A. § 1319-U(5). *Id.* ¶¶ 89-93. Count XVII seeks double damages under 30-A M.R.S.A. § 3352(2). *Id*. ¶¶ 121-24. The plaintiff does not seek summary judgment against the other defendants, who are also named in these counts.

1. Count IX. The Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9601 *et seq.*, imposes strict liability for certain costs on

> any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, or by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances . . . .

42 U.S.C. § 9607(a)(3). The amended complaint cites this section of CERCLA as the basis for the plaintiff's claim against the named defendants. Fleet does not contest the plaintiff's characterization of the Mill 3 grit as a hazardous substance for purposes of its motion for summary judgment but rather contends that the plaintiff is itself liable under CERCLA and accordingly is entitled, at most, to contribution from Fleet rather than the full recovery for its response costs that it seeks. Fleet Motion at 13-15. The plaintiff contends that Fleet "is strictly liable for Lewiston's response costs under CERCLA" because Fleet was the generator of the waste as that term is defined in applicable regulations. Lewiston Motion at 7-9. Both motions are notable for their lack of citation to helpful case law on this issue.

The plaintiff asserts that its right of action against Fleet under CERCLA is created by 42 U.S.C. § 9613(f). *Id*. at 8. Significantly, that statutory section provides for an action for contribution "from any other person who is liable or potentially liable under section 9607(a) of this title." It does not provide for

indemnification or full recovery, if that is what the plaintiff is seeking in this count. Fleet so interprets the amended complaint, because it makes no attempt to argue that it could not be liable at all; it merely contends that "Lewiston is not an innocent party within the meaning of the statute" and that it is therefore entitled to summary judgment. Fleet Motion at 14-15. The plaintiff's "innocence" is disputed, *see, e.g.*, Fleet's SMF ¶¶ 7, 12, 29, 34; Plaintiff's Responsive SMF ¶¶ 7, 12, 29, 34, so it is not entitled to summary judgment on a claim for full recovery of its costs. However, the dispute also means that Fleet is not entitled to summary judgment insofar as Count IX is interpreted as a claim for full recovery of the plaintiff's costs.

However, the count as pleaded and as presented by the plaintiff may also be construed to be seeking contribution for some portion of the response costs incurred by the plaintiff. *See generally City of Bangor v. Citizens Communications Co.*, 2004 WL 483201 (D. Me. Mar. 11, 2004), at *1, *4 (discussing difference between actions for recovery of costs under section 9607 and actions for contribution under section 9613). Because the summary judgment record also includes evidence that would allow a rational factfinder to conclude that Fleet arranged for the disposal of the hazardous substance at issue or that it was a "generator" of the wastes at issue under CERCLA, Fleet could be liable for such contribution. *See* 40 C.F.R. § 260.10 ("Generator means any person, by site, whose act or process produces hazardous waste . . . or whose act first causes a hazardous waste to become subject to regulation."). Accordingly, Fleet is not entitled to summary judgment on this count.

The evidence that Fleet was a "generator" is not undisputed, however. *See, e.g.*, Lewiston SMF ¶¶ 25, 26, 36, 51, 52; Fleet's Responsive SMF ¶¶ 25, 26, 36, 51, 52; Lewiston's Additional SMF ¶ 51. For that reason, the plaintiff is not entitled to summary judgment on liability on this court. The plaintiff argues in its opposition to Fleet's motion that "if Lewiston was at fault" under CERCLA, "it was Fleet's fault" as Lewiston's agent. Lewiston's Memorandum in Opposition to Fleet's Motion for Partial Summary Judgment

("Plaintiff's Opposition") (Docket No. 101) at 15. This assertion is hotly disputed, both as to underlying facts, *see, e.g.*, Fleet's SMF ¶¶ 7, 24, Plaintiff's Responsive SMF ¶¶ 7, 24; Lewiston's SMF ¶ 9, 10, 36, Fleet's Responsive SMF ¶¶ 9, 10, 36, and as to interpretation of applicable law.[2] There is no evidence in the summary judgment record of the remediation costs incurred by the plaintiff, so it would not be entitled to summary judgment on damages in any event.

Neither Fleet nor the plaintiff is entitled to summary judgment on Count IX on the showing made.[3]

2. Counts X and XVII. Count X of the amended complaint alleges that the defendants are liable to the plaintiff under 30-A M.R.S.A. § 3352(2) and 38 M.R.S.A. § 1319-U(5). Amended Complaint ¶¶ 89-93. Count XVII alleges that the plaintiff is entitled to double damages under 30-A M.R.S.A. § 3352(2). *Id.* ¶¶ 121-24. The plaintiff and Fleet both seek summary judgment on these two counts.

The statutes at issue in these counts provide, in relevant part:

> **1. Prohibited dumping**. [W]hoever personally or through the agency of another leaves or deposits and offal, filth or other noisome substance in any public dumping ground, except in the manner prescribed by the local health officer, is guilty of a Class E crime and shall be punished by a fine of not less than $10 no more than $100, or by imprisonment for not more than 3 months.
>
> **2. Civil action**. A municipality may recover any expenses incurred in abating the nuisance caused by the violation in a civil action brought in the name of the municipality against the guilty party. If requested and the violation merits it, the court in its discretion may award double damages in the action.

30-A M.R.S.A. § 3352.

[2] Assuming the assertion to be true, however, does not entitle the plaintiff to anything more than contribution from Fleet.

[3] Without any additional argument, Lewiston, Platz and LMRC contend that Platz is entitled to summary judgment on Count II of Fleet's third-party complaint and that LMRC is entitled to summary judgment on Count III of the third-party complaint, for the same reasons that entitle Lewiston to summary judgment on Count IX of its amended complaint. Lewiston Motion at 9. Because I conclude that Lewiston is not entitled to summary judgment on that count, this cursory argument fails as well.

> **5. Civil liability.** A person who disposes of or treats hazardous waste, when that disposal or treatment, in fact, endangers the health, safety or welfare of another, is liable in a civil suit for all resulting damages. It is not necessary to prove negligence.
>
> For the purposes of this section, damages are limited to damages to real estate or personal property or loss of income directly or indirectly as a result of a disposal or treatment of hazardous wastes.

38 M.R.S.A. § 1319-U(5).

With respect to section 1319-U(5), Fleet contends that because it did not transport the Mill 3 grit to the Landfill, it did not dispose of any hazardous waste; that the plaintiff cannot prove that the grit was hazardous waste; and that the plaintiff's own commissioned study "details how the Mill 3 Grit poses no danger." Fleet Motion at 10-11. The plaintiff contends that it is entitled to summary judgment on its claim under this statute because "[t]he Mill 3 Wastes were hazardous because the exceeded the EPA and DEP toxicity limit for lead" and that "Fleet's arrangements for the transportation and disposal of these wastes at the Landfill" make Fleet liable. Lewiston Motion at 10. The plaintiff's argument makes no mention of the fact that the statute requires that the waste at issue in fact endanger the health, safety or welfare of another. In its opposition to Fleet's motion, the plaintiff appears to assume that because there is evidence that the waste was hazardous, it may be assumed that the waste in fact endangered the health, safety or welfare of another, Lewiston Opposition at 12, but that approach would render the "in fact" requirement of the statute superfluous, in contradiction to basic rules of statutory construction. *Reid v. Gruntal & Co.*, 763 F. Supp. 672, 676 (D. Me. 1991) (fundamental tenet of statutory construction is that statue should be construed so that effect is given to all provisions, so that no part will be superfluous or insignificant). On the showing made, the plaintiff is not entitled to summary judgment on that portion of Count X that relies on 38 M.R.S.A. § 1319-U(5).

The same is true of Fleet, but for a different reason. Fleet's only references to evidence supporting its contention that the Mill 3 Grit did not in fact endanger the health, safety or welfare of another are to documents rather than to paragraphs in its statement of material facts. Fleet Motion at 11-12. Its statement of material facts does include the assertion that the study mentioned in its motion "contended that the Mill 3 Grit proved no health concerns." Fleet SMF ¶ 33. *See also* Fleet Responsive SMF ¶ 53. The plaintiff's qualification of paragraph 33 of Fleet's statement of material facts states "Mr. Grillo actually testified that it was his opinion that the sand blast grit did not pose a particular health and safety risk where it was in the landfill." Lewiston's Responsive SMF ¶ 33. This is insufficient to establish that the plaintiff could not prove the third element of the statutory test. Assuming *arguendo* that the plaintiff could not establish that Fleet disposed of the grit or that the grit was in fact hazardous, therefore, Fleet is nonetheless not entitled to summary judgment on this portion of Count X.

With respect to section 3352, Fleet contends that it must be found guilty of the crime described in subsection 1 before it may be held civilly liable under subsection 2, an event which has not occurred. Fleet Motion at 12-13. The plaintiff simply states that "[i]t is difficult to contemplate a more noisome substance than hazardous wastes," directing its argument instead to its alleged entitlement to double damages. Lewiston Motion at 10-11. The plaintiff's opposition does not respond to Fleet's statutory construction argument, nor does Fleet's opposition mention section 3352. I agree with Fleet's interpretation of section 3352, at least to the extent that a municipality seeking to recover under section 3352(2) must prove that the defendant violated section 3352(1), without deciding whether a criminal conviction under that subsection is required. The plaintiff offers no argument, let alone any evidence, that would allow a reasonable factfinder to conclude that Fleet dumped the Mill 3 grit in the Landfill "except in the manner prescribed by the local health officer." Fleet is accordingly entitled to summary judgment on that portion of Count X that seeks

recovery under 30-A M.R.S.A. § 3352 and on Count XVII, which seeks double damages under 20-A M.R.S.A. § 3352(2).

B. Counts XIII-XVI of the Amended Complaint

Fleet seeks summary judgment on Counts XIII-XVI of the amended complaint. I will address these counts in the order in which they appear in the amended complaint.

1. Count XIII. This count sounds in common-law negligence, alleging that the defendants breached "a duty to Lewiston to sample and test the Mill 3 Waste in a manner which would provide Lewiston with test results which accurately reflected the actual lead content in all of the sandblast grit that [the defendants] asked and induced Lewiston to accept at its Landfill." Amended Complaint ¶¶ 104-05.

Fleet contends that this claim rests "on a single allegation[:] namely that neither Fleet nor M[aine] SF[, Inc.] advised Lewiston of the results of the First TCLP Test." Fleet Motion at 9. It asserts that it is "undisputed" the Maine SF, Inc. advised Bruce Allen of Platz, who was an agent of the plaintiff, of the results of that test. *Id*. at 9-10. It also contends that advising LMRC's agent of the results is the equivalent of advising the plaintiff, because LMRC is "nothing more than an 'operating shell' of the City of Lewiston." *Id*. at 10 n.4. The plaintiff responds that its negligence claim "is based upon Fleet's obligation of properly characterizing the lead content of all the wastes." Plaintiff's Opposition at 10. Relying on the testimony of its expert witness, the plaintiff contends that Fleet "failed to comply with applicable EPA regulations and industry practices;" "failed to ascertain that the wastes were indeed hazardous[;] and represented to landfill personnel that the wasters were not hazardous and could be accepted for disposal there." *Id*. at 10-11. Again, neither party has provided the court with any citations to authority in support of these arguments. Fleet did not file a reply to the plaintiff's opposition to its summary judgment motion.

The plaintiff's characterization of Count XIII of its amended complaint is reasonable. Amended Complaint ¶¶ 104-06. The paragraphs of its statement of material facts and responsive statement of material facts that it cites in support of that characterization are disputed, but sufficient to overcome Fleet's motion for summary judgment on this count.

2. Counts XIV and XV. These counts respectively allege negligent and fraudulent misrepresentation. Amended Complaint ¶¶ 107-17. Fleet makes the same argument with respect to these counts that it made in support of its motion for summary judgment on Count XIII. Fleet Motion at 9-10. The plaintiff responds that these claims are based on "Fleet's failure to disclose the hazardous nature of the waste Fleet caused to be disposed of in the landfill and . . . its mischaracterization of such waste." Plaintiff's Opposition at 8. Again, this is a reasonable characterization of the allegations in the amended complaint and the paragraphs of its statement of material facts and responsive statement of material facts support its position sufficiently so that a reasonable factfinder could decide in its favor. *Id*. at 8-10. On the showing it has made, Fleet is not entitled to summary judgment on these counts.

3. Count XVI. This count is entitled "Wrongful Involvement in Litigation." Amended Complaint at 17. Fleet contends, in a minimal argument, that "Maine Law does not recognize the tort of wrongful involvement in litigation." Fleet Motion at 9. The plaintiff asserts in response that the Maine Law Court "has expressly recognized" this tort. Plaintiff's Opposition at 6. However, the case cited in support of this assertion by the plaintiff, *Gagnon v. Turgeon*, 271 A.2d 634 (Me. 1970), holds only that the costs of litigation may be recovered as damages flowing from a tort that led to the litigation, *id*. at 635. As this court has held, Maine does not recognize wrongful involvement in litigation as a separate tort. *Saco Steel Co. v. Saco Defense, Inc.*, 910 F. Supp. 803, 812 (D. Me. 1995). Fleet is entitled to summary judgment on this count, although

the plaintiff may recover such damages upon proper proof should it succeed on one or more of its other tort claims. *Id*. n. 14.

C. Contribution and Indemnification Claims

LMRC and Platz move for summary judgment on Counts V and VI of Fleet's third-party complaint, which seek contribution and indemnification under common law for any liability it may incur for damages sustained by Lewiston, Third-Party Complaint of Fleet Environmental Services, LLC (Corrected) (Docket No. 38) ¶¶ 30-37, asserting that there is no evidence in the record of any such common-law duty, Lewiston Motion at 12-13. Fleet's only mention of these claims in its opposing memorandum of law is included in the following sentence: "In addition to common law contribution claims that exist due to the moving Parties' breach of the Mill3 Contract, Fleet has CERCLA § 113(f) contribution claims against the Parties." Fleet Opposition at 10. It is questionable whether this presentation is sufficient to preserve any opposition to the motion for summary judgment on these counts. In any event, this court must nonetheless reach the merits of any claim for summary judgment. Any statutory or contractual entitlement to contribution or indemnification presents a separate claim; it does not and cannot as a matter of law also give rise to a common-law claim. *See Fireman's Ins. Co. of Newark, N.J. v. Todesca Equip. Co.*, 310 F.3d 32, 37 & n.7 (1st Cir. 2002) (common-law indemnity not available when express indemnification contract exists). To the extent that Fleet intends its claims to be construed to include the allegation that it is entitled to common-law contribution or indemnification should none be available under the contract it mentions, Fleet has provided no citation to any factual support in the record for such claims against LMRC and Platz, and LMRC and Platz are accordingly entitled to summary judgment on Counts V and VI of the third-party complaint.

LMRC and Platz also seek summary judgment on Counts I and IV of their counterclaims against Fleet, Lewiston Motion at 11-12, which assert claims for breach of contract and contractual contribution

and indemnification against Fleet, Third-Party Defendant Lewiston Mill Redevelopment Corporation's Answer, Affirmative Defenses, Counterclaim, and Crossclaim (Docket No. 48) at 6-14, ¶¶ 28-32, 43-45; Third-Party Defendant Platz Associates' Answer, Affirmative Defenses, Counterclaim, and Crossclaim ("Platz Counterclaim") (Docket No. 50) at 6-14, ¶¶ 28-32, 43-45. However, the motion does not discuss the breach-of-contract claims or the contribution and indemnification claims of Platz. The motion for summary judgment as to Count I of each counterclaim and Count IV of the Platz Counterclaim must therefore be deemed waived.

LMRC contends that Fleet contracted to indemnify it for damage caused by Fleet pursuant to Paragraph 7.1 of the Mill 3 contract. Lewiston Motion at 11-12. Fleet responds that Paragraph 7.2 of that contract is a reciprocal indemnification clause, giving "the Parties" "the same indemnification liability to Fleet" that Fleet might have to them. Fleet Opposition at 8-9. This may well be, but it is not a response to LMRC's contention that it is entitled to summary judgment under Paragraph 7.1. LMRC's position is supported by paragraph 12 of Lewiston's SMF, which is not disputed in any material respect by Fleet's "qualified" response. Fleet's Responsive SMF ¶ 12. LMRC is accordingly entitled to summary judgment on Count IV of its counterclaim. Whether that indemnification, if it becomes operable at some point, is ultimately offset by a claim by Fleet for indemnification is a separate question for another day.

IV. Conclusion

For the foregoing reasons, I recommend that Fleet's Motion for Partial Summary Judgment (Docket No. 81) be **GRANTED** as to Counts XVI, XVII and that portion of Count X of the amended complaint that seeks recovery under 30-A M.R.S.A. § 3352 and otherwise **DENIED**; and that the Joint Motion for Partial Summary Judgment by Lewiston, LMRC, and Platz Associates (Docket No. 84) be **GRANTED** as

to Counts V and VI of Fleet's third-party complaint against LMRC and Platz (Docket No. 38) and Count IV of that third-party complaint only as to LMRC and otherwise **DENIED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum and request for oral argument before the district judge, if any is sought, within ten (10) days after being served with a copy thereof. A responsive memorandum and any request for oral argument before the district judge shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 29th day of June, 2004.

/s/ David M. Cohen
David M. Cohen
United States Magistrate Judge

Plaintiff

LEWISTON, CITY OF represented by **PETER J. BRANN**
BRANN & ISAACSON
184 MAIN STREET
P. O. BOX 3070
LEWISTON, ME 04243-3070
786-3566
Email: pbrann@brannlaw.com

KEVIN J. BEAL
BRANN & ISAACSON
184 MAIN STREET
P. O. BOX 3070
LEWISTON, ME 04243-3070

786-3566
Email: kbeal@brannlaw.com

DAVID BERTONI
BRANN & ISAACSON
184 MAIN STREET
P. O. BOX 3070
LEWISTON, ME 04243-3070
786-3566
Email: dbertoni@brannlaw.com

V.

Defendant

FLEET ENVIRONMENTAL SERVICES L L C

represented by **TIMOTHY M. MITCHELSON**
KEVIN M. CONSIDINE P.C.
COUNSELORS AT LAW
ONE BOSTON PLACE
BOSTON, MA 02108
617-723-9900
Email: tmm@kmcpclaw.com

JAMES W. STETSON
KEVIN M. CONSIDINE P.C.
COUNSELORS AT LAW
ONE BOSTON PLACE
BOSTON, MA 02108
617-723-9900
Email: jws@kmcpclaw.com

KEVIN M. CONSIDINE

KEVIN M. CONSIDINE P.C.
COUNSELORS AT LAW
ONE BOSTON PLACE
BOSTON, MA 02108
617-723-9900
Email: kmc@kmcpclaw.com

ROBERT S. FRANK
HARVEY & FRANK
TWO CITY CENTER
P.O. BOX 126
PORTLAND, ME 4112
207-775-1300
Email: frank@harveyfrank.com

MAINE SF INCORPORATED represented by **DAVID KREISLER**
(See above for address)

JAMES G JABBUSCH represented by **DAVID KREISLER**
(See above for address)